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August 27, 1954
Opinion No. 54-129

TO: The Honorable T. J. Mahoney
Pinal County Attorney
Pinal County Courthouse
Florence, Arizona

RE: Prosecution of inmates of the
Arizona State Prison subsequent
to incarceration.

QUESTION: May an inmate of the Arizona
State Prison who has been
sentenced to the State Prison
for a life term be charged
with the crime of grand theft?

The modern doctrine relating to the question here presented, as enunciated by the cases, is set forth in 18 C.J.S., Convicts, Section 8(b), page 100, as follows:

"b. Modern Doctrine.

A convict, during his imprisonment, may be tried and sentenced for a crime committed prior or subsequent to his conviction. The additional sentence may commence after the original term, or be served first and followed by the unexpired portion of the original; or it may be for life, or for death.

As has been quoted from the Corpus Juris text, the idea that, because a convict is under many disabilities, he may with impunity commit crime as he has opportunity, is untenable. Hence, in the absence of special statutory exceptions, it is the general rule that a convict, although serving his term, may be tried and sentenced for a crime committed either prior or subsequent to the conviction under which he is enduring punishment; and the fact that the convict must remain, during the trial, in the custody of an agent of the jurisdiction in which he was convicted is no bar to the prosecution.

So, if a convict while serving his sentence

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commits, or is convicted of, another offense, he may be tried and sentenced to a term in addition to his original sentence, which additional sentence may either commence at the expiration of his present one, or be served first, followed by the unexpired portion of the original sentence; or he may be sentenced for life, in which case the term will commence on the day of conviction and sentence and run concurrently with that of the former sentence; or he may be sentenced to death and executed accordingly, for the fact that a convict is undergoing sentence in a state prison is no bar to his trial, conviction, and sentence for another and higher grade of offense."

Although the case of *PONZI v. FESSENDEN*, 258 U.S. 254, 66 L.Ed. 607, 42 S.Ct. 309, 22 A.L.R. 879, specifically involved the authority of the United States to transfer a federal prisoner to a state court for the purpose of prosecution for a state crime, The United States Supreme Court stated:

"The authorities, except when special statutes make an exception, all are agreed that the fact that a defendant in an indictment is in prison, serving a sentence for another crime, gives him no immunity from the second prosecution. One of the best-considered judgments on the subject is *Rigor v. State*, 101 Md. 465, 61 Atl. 631, 4 Ann. Cas. 719. The supreme court of Maryland said (471):

"The penitentiary is not a place of sanctuary, and an incarcerated convict ought not to enjoy an immunity from trial merely because he is undergoing punishment on some earlier judgment of guilt."

Delay in the trial of accused persons greatly aids the guilty to escape because witnesses disappear, their memory becomes less accurate, and time lessens the vigor of officials charged with the duty of prosecution. If a plea of guilty and imprisonment for one offense is to postpone trial on many others, it furnishes the criminal an opportunity to avoid the full expiation of his

crimes. These considerations have led most courts to take the same view as that expressed in the case just cited. Other cases are State v. Wilson, 38 Conn. 126; Thomas v. People, 67 N.Y. 218, 225; Peri v. People, 65 Ill. 17; Com. v. Ramunno, 219 Pa. 204, 14 L.R.A. (N.S.) 209, 123 Am. St. Rep. 653, 68 Atl. 184, 12 Ann.Cas. 818; Kennedy v. Howard, 74 Ind. 87; Singleton v. State, 71 Miss. 782, 42 Am.St.Rep. 488, 16 So. 295; Huffaker v. Com. 124 Ky. 115, 98 S.W. 331, 14 Ann.Cas. 487; Clifford v. Dryden, 31 Wash. 545, 72 Pac. 96; People v. Flynn, 7 Utah, 378, 26 Pac. 1114; Ex parte Ryan, 10 Nev. 261; State v. Keefe, 17 Wyo. 227, 252, 22 L.R.A. (N.S.) 896, 98 Pac. 122, 17 Ann.Cas. 161; Re Wetton, 1 Cromp. & J. 459, 148 Eng.Reprint, 1503, 1 Tryw. 385; R. g. v. Day, 3 Post. & F. 526.

It is objected that many of these cases relate to crimes committed in prison during service of a sentence. The Maryland case did not, nor did some of the others. But the difference suggested is not one in principle. If incarceration is a reason for not trying a prisoner, it applies whenever and wherever the crime is committed. The unsoundness of the view is merely more apparent when a prisoner murders his warden, than when he is brought before the court for a crime committed before his imprisonment. It is the reductio ad absurdum of the plea.

Nor, if that be here important, is there any difficulty in respect to the execution of a second sentence. It can be made to commence when the first terminates. Kite v. Com. 11 Met. 581, 585 (an opinion by Chief Justice Shaw); Ex parte Ryan 10 Nev. 261, 264; Thomas v. People, 67 N.Y. 218, 226." (Emphasis supplied)

In the case of PEOPLE v. HAYES, 9 Cal. App.2d, 157, 49 P.2d 288, the defendant was sentenced to the state prison for robbery.

Thereafter he was indicted and entered pleas of guilty to further robbery charges apparently committed prior to his incarceration. In its opinion, the court held:

"* * *But even where a defendant is already under a life sentence or even a sentence of death, this does not afford him immunity from prosecution and conviction of other offenses; nor does it preclude the court from passing judgment and sentence upon a subsequent conviction. The fact that a prisoner who serves a life term, and while serving such, dies in prison cannot serve other sentences imposed for other offenses and running consecutively does not prevent, as a matter of law, the imposing of such consecutive sentences even though, as stated in Re Woofter, 134 Cal. App. 580, 583, 25 P(2d) 859, the additional penalty cannot be imposed, i.e., actually inflicted, upon such life term. It might also be mentioned that even where a prisoner is serving a life sentence this does not of necessity mean that he will remain in prison until he dies. Parole, commutation, or pardon may release him from prison long before his term of life ends." (Emphasis supplied)

Turning to the Arizona statutes relating to the problem presented herein, Section 43-5005, A.C.A. 1939, recites:

"43-5005. Reimbursing county for expense of trial.--Whenever a trial shall be had of a prisoner in the state prison for any crime committed therein, the clerk of the court in which such trial is had shall prepare an itemized claim against the state for the court costs, exclusive of attorneys' fees, incurred by the county for such trial, and the cost of guarding and keeping such prisoner, which claim shall be certified by the judge of said court and sent to the board of directors of state institutions for approval. Upon such approval the board shall file the claim with the state auditor

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and shall be paid out of the appropriation for the support of the said prison to the county treasurer of the county where such trial was had." (Emphasis supplied)

By virtue of the wording contained in this legislative mandate there is authority impliedly granted to prosecute prison inmates for any crime which they may commit while incarcerated.

Further, Section 43-114, A.C.A. 1939, relating to the capacity to commit a crime does not in any manner dictate that a prison inmate is incapable of committing crimes.

Section 43-6116, A.C.A. 1939, merely provides that a person sentenced to imprisonment to a state prison for life is deemed civilly dead. No provision is made therein that they shall not be responsible for their crimes subsequent to the imposition of a life sentence.

Pertaining to criminal procedure, Section 44-2217, A.C.A. 1939, enumerating the causes which may be alleged why a sentence should not be pronounced does not prescribe as one of the reasons the fact that the defendant is presently incarcerated under a life sentence previously imposed.

Construing these statutory enactments along with the principles enumerated in the cases above set forth, it is our considered opinion that the fact a defendant is in prison serving a sentence for a crime gives him no immunity from a second prosecution either for a crime committed while he was incarcerated or one committed prior to his conviction. Consequently, an inmate of the Arizona State Prison may be charged with the crime of grand theft notwithstanding the fact that he is presently incarcerated under a life sentence.

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